STATE OF MICHIGAN
IN THE SUPREME COURT

JEANNETTE GORDON,

Plaintiff-Appellant

vs.

HENRY FORD HEALTH SYSTEM,

Defendant-Appellee.

SC No. 125335

COA No. 244596

WCAC
LC No. 01-000173

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DEFENDANT-APPELLEE HENRY FORD HEALTH SYSTEM'S SUPPLEMENTAL BRIEF ON APPEAL

PROOF OF SERVICE

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QUESTIONS PRESENTED

I. WHETHER FOR PURPOSES OF DETERMINING DEFENDANT'S RIGHT TO SET-OFF IS IT IRRELEVANT WHETHER PLAINTIFF IS MOUNT VERNON GROUP HOME'S EMPLOYEE PURSUANT TO MCL 418.161(1)?

Defendant-Appellant respectfully answers "Yes."

II. WHETHER SUBSECTIONS 371(1) AND 301(5) ARE COMPATIBLE STATUTES, EACH OF WHICH MAY BE USED FOR THE SET-OFF THROUGH THE DEDUCTION OF WAGES?

A. WHETHER MCL 418.371(1) IS APPLICABLE?

B. WHETHER MCL 418.301(5) IS APPLICABLE?

Defendant-Appellant respectfully answers "Yes."

III. WHETHER INCOME EARNED FROM PLAINTIFF'S BUSINESS CAN BE BOTH WAGES AND WAGE EARNING CAPACITY?

Defendant-Appellant respectfully answers "Yes."

IV. WHETHER PLAINTIFF'S WAGES AND/OR WAGE EARNING CAPACITY ARE THE NET EARNINGS FROM MT. VERNON GROUP HOME?

Defendant-Appellant respectfully answers "Yes."

V. WHETHER PLAINTIFF'S ACTIVITIES AND OPERATION OF THE MOUNT VERNON GROUP HOME ESTABLISHES WAGE EARNING CAPACITY IN THE "SAME OR OTHER EMPLOYMENTS?"

Defendant-Appellant respectfully answers "Yes."

INTRODUCTION

Subsequent Procedural History and Jurisdiction

On December 29, 2003, Plaintiff-Appellant, Jeannette Gordon, filed her Application for Leave to Appeal to this Court, requesting review of the November 18, 2003, Michigan Court of Appeals decision affirming the Workers' Compensation Appellate Commission's (hereinafter "WCAC") decision rendered in WCAC No. 00-121533, allowing Defendant Appellee, Henry Ford Health System, an offset of benefits pursuant to MCL 418.371(1). Plaintiff-Appellant requested Leave to Appeal on two questions presented: (1) has the WCAC conducted an impermissible *de novo* review, substituting its findings of fact for those of the magistrate and justifying by erroneously characterizing its efforts as legal rather than factual; and (2) even if it correctly held that any of Plaintiff's business income could be offset against Plaintiff's workers' compensation benefits, did the WCAC err in not limiting that offset to that portion of the income attributable to Plaintiff's own efforts, as opposed to a return on her investment? Defendant-Appellee filed its Answer to Plaintiff-Appellant's Application for Leave to Appeal on January 16, 2004, requesting that leave to appeal be denied.

On July 8, 2004, this Court, pursuant to authority under MCR 7.302(G)(1), issued its Order directing the Clerk to schedule oral argument on whether to grant the Application or take other peremptory action authorized by MCR 7.302(G)(1). The Court directed the parties to address five issues at oral argument and authorized supplemental briefs by the parties and amicus curia (July 8, 2004 Order).

The issues presented by this Court for review are:

(1) Whether Plaintiff is an "employee" of Mt. Vernon Group Home, Inc., under MCL 418.161(1);

(2) Whether income derived as owner or employee of Plaintiff's group home business constitutes "wages" or reflects "wage earning capacity" that may be deducted from Defendant's liability for workers' disability compensation benefits;

(3) Whether deduction of wages is governed by MCL 418.301(5)[1] or 418.371(1);

(4) Whether assuming, *arguendo*, that MCL 418.371(1) applies, whether Plaintiff demonstrates wage earning capacity "in the same or other employment"; and

(5) Whether in determining Plaintiff's wages or wage earning capacity, if any, the amount should be equal to the net profit of the business or whether the amount should be based on the fair market value of the services performed by Plaintiff (July 8, 2004, Order).

STATEMENT OF FACTS

The facts of this case were set forth in Defendant-Appellee's Statement of Facts in its Answer to Plaintiff-Appellant's Application for Leave to Appeal. However, for the Court's convenience, the pertinent facts as they apply to this Supplemental Brief are set forth below.

Plaintiff-Appellant, Jeannette Gordon (hereinafter "Plaintiff"), a registered nurse working for Defendant-Appellee, Henry Ford Health System (hereinafter "Defendant"), since 1977, injured her back while lifting a patient on May 22, 1987. She was off work until September of 1987, when she returned to work as a nurse without restrictions. Plaintiff then slipped on ice in Defendant's parking lot on February 16, 1988. She has not returned to work with Defendant since that date. She is currently receiving workers' compensation benefits related to those injuries

[1] The Court's July 8, 2004, Order contains a typographical error in issue number three. This was corrected in the Court's July 16, 2004, Amendment to Order.

at the rate of $397.00 per week pursuant to the Order of Magistrate Mary Sue Connolly dated June 23, 1992.

Plaintiff testified that she is the owner-operator of two adult foster care homes for mentally disabled residents (TI, 17-18, 69, 71),[2] which operate under the corporate name "Mt. Vernon Group Home, Inc." Plaintiff and her daughter are the sole shareholders of the corporation; however, Plaintiff is the licensee for the adult foster care homes (TI, 19).[3] Plaintiff has owned and operated one of the homes since June of 1997, and she obtained the other in September of 1999.

Plaintiff testified that the state interviewed her to determine that she was qualified to operate the two group homes and issued her a license to do so (TI, 18). Significantly, Plaintiff testified that her qualifications as a registered nurse and her prior experience and training with caring for the mentally disabled with Defendant helped significantly in obtaining the license (TI, 94).

With regard to Plaintiff's actual involvement with the running of the homes, Plaintiff testified that she deals with the state and county (TI, 20, 22-23), and that she visits the homes just about every day to make sure that the residents are being taken care of and the staff is attending to their needs (TI, 27). If there are any objections or complaints, Plaintiff makes herself available to discuss them (TI, 27). Plaintiff allowed that sometimes she is the one who does the grocery shopping for the homes and that she ensures that the homes are provisioned with whatever papers, pencils, charts, and other supplies are necessary (TI, 28-29). In addition, Plaintiff conceded that

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[2] For ease of reference, "TI" indicates the hearing transcript for September 6, 2000, and "TII" indicates the hearing transcript for September 19, 2000.

[3] Adult foster care homes are typical houses in residential areas, but the residents are cared for by direct-care workers who staff the home. The state (i.e., the Department of Community Mental Health) funnels budgeted funds to such homes through intermediate agencies, such as Oakland Community Mental Health. (See, e.g., TI, 23.)

she signs payroll checks, transports residents, establishes wages, hires and fires staff members, and retains people to perform maintenance inside and outside the homes (TI, 33). Defendant also introduced the testimony of a private investigator, as well as videotaped surveillance of Plaintiff picking up and delivering supplies to the group homes (TI, 115-127; TII, 5).

When confronted with an application for credit that she, herself, had completed, Plaintiff admitted that she had represented that her employer was Mt. Vernon Group Home, that her occupation was RN/Administrator/Landlord, and that her monthly salary was $10,000.00 (TI, 64-65). Plaintiff's tax returns for the relevant period revealed her reported income from the operation of the foster care homes, as well as her reported rental income/losses from her ownership of several properties. The Magistrate summarized this evidence as follows:

> [P]laintiff's 1998 individual U.S. tax return shows . . . plaintiff earning $87,474.00 from Mt. Vernon Group Home, Inc., and $8,396.00 from rental income without any income from wages and salaries. The same income tax return indicates that the corporation had total income of $242,511.00 less business-related deductions of $155,037.00. Additionally, defendant introduced plaintiff's 1999 U.S. income tax return that shows corporate earnings of $60,321.00 with plaintiff also reporting a loss of $17,743.00 from her rental real estate activities resulting in supplemental income of $42,578.00 for 1999. According to plaintiff, her income from her group home business represents return on her initial investment (Opinion of Magistrate Patrick Maclean dated April 7, 2001, 3-4).

Thus, dividing Plaintiff's 1998 earnings of $87,474.00 by 52 weeks reveals that Plaintiff's weekly earnings were $1,682.19. Dividing Plaintiff's 1999 earnings of $60,321.00 by 52 weeks reveals that Plaintiff's weekly earnings were $1,160.02.

ARGUMENT

The Workers' Disability Compensation Act (hereinafter "WDCA") was adopted in 1912 as a no-fault system which required employers to compensate injured employees. In exchange for this almost automatic liability, the WDCA limited the amount that a worker could recover to: (1) wage loss; (2) medical, and (3) potential vocational rehabilitation. The underlying case focuses solely on the wage loss compensation payable to Plaintiff.

With regard to compensation payable, it is well established that the WDCA compensates injured employees for their loss of wages and wage earning capacity. While the fundamental principle underlying workers' compensation is full compensation for injuries sustained and the resultant loss of wage earning capacity, "[e]qually clear is the proposition that workers' compensation law does not favor double recovery." *Thick v Lapeer Metal*, 419 Mich 342; 353 NW2d 464 (1984). With that as a reference, it is clear that compensation payable to Plaintiff is subject to set-off for her earnings as the owner/operator and administrator of Mt. Vernon Group Home.

I. FOR PURPOSES OF DETERMINING DEFENDANT'S RIGHT TO SET-OFF IT IS IRRELEVANT WHETHER PLAINTIFF IS MOUNT VERNON GROUP HOME'S EMPLOYEE PURSUANT TO MCL 418.161(1).

Defendant never argued that Plaintiff is an "employee" of Mt. Vernon Group Home pursuant to MCL 418.161 because it was not required for application of the set-off. The term "employee" is defined by MCL 418.161 and is limited to discern "employee" for the purpose of determining the right to entitlement for benefits under the WDCA. The applicability of the definition contained in MCL 418.161(1) is solely for this purpose and not for the purpose of

defining other terms related to employment within the WDCA. More specifically, the term "employment" and/or "employed" when used throughout the WDCA may not be limited to, or tied together with, the definition of "employee." This is evident because several obvious employment categories are excluded from the definition of "employee" pursuant to MCL 418.161. For example, Subsection 161(1)(n) excludes independent contractors from the definition of "employee." *See, e.g., McCaul v Modern Tile and Carpet, Inc.*, 248 Mich App 610; 640 NW2d 589 (2001). Further, sole proprietors are similarly excluded from the definition of "employee" pursuant to Section 161. *See, Lee v Lee & Sons*, 72 Mich App 257; 249 NW2d 380 (1977). While not technically "employees" pursuant to Section 161, clearly, such individuals are "employed" and engaged in "employment."[4]

Both Subsections 371(1) and 301(5) utilize subsequent "employments" for the purposes of their set-off provisions. Significantly, the Legislature has not limited the application of the set-off to circumstances wherein the claimant is defined as an "employee" pursuant to Section 161. If the Legislature had intended only to limit set-off to circumstances in which the subsequent employment required the claimant to be an "employee" pursuant to Section 161, the Legislature would have so provided in the WDCA. Their omission is indicative that they did not intend this result. *Cherry Growers, Inc v Michigan Processing Apple Growers Inc.*, 240 Mich App 153, 170; 610 NW2d 613 (2000) ("Courts may not speculate regarding the probable intent of the Legislature beyond the language expressed in the statute").

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[4] The Dictionary defines "employment" as "[t]he work in which one is engaged; occupation." American Heritage Dictionary of the English Language, 2000.

In *Empire Iron Min. Partnership v Orhanen*, 455 Mich 410, 416-417; 565 NW2d 844 (1997), this Court was asked to add terms and meaning omitted by the Legislature in provisions of the Michigan Employment Security Act. Specifically, the defendants sought to infer a "good faith" requirement to the criteria of MCL 421.29(8)(b) and to construe the "employer" to be limited to one employer for purposes of qualifying for benefits pursuant to the applicable section. *Id.* The Legislature had indicated neither requirement when it enacted the provision. This Court ruled that it was prohibited from adding the requirements and from interpreting "employer" in the manner requested by the defendant. Specifically, this Court stated: "We will not judicially legislate by adding language to the statute." *Empire,* 455 Mich at 421.

The plain meaning of set-off provisions in Subsections 371(1) and 301(5) are clear that they do not require application of the term "employee" in Section 161. If, however, this Court finds that this meaning is not plain on its face, further analysis pursuant to the factors to be considered when a legislative provision is ambiguous compels the same result Defendant advocates under the plain meaning rule.

As this Court set forth in *Cain v Waste Management Inc.,* 259 Mich App 350, 365; 674 NW2d 390 (2003):

> The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. The first criterion in determining intent is the specific language of the statute. If reasonable minds can differ as to the meaning of the statute, then judicial construction is appropriate. 'The court must consider the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose, but should also always use common sense.' Accordingly, when construing statutes, courts should seek to avoid a construction that would produce absurd results, injustice, or prejudice to the public interest. *Id.*

It was the intent of the Legislature in enacting the Act and its set-off provisions to equitably balance the interests of the employer and the employee when an employee becomes injured on the job. *See, Lahay v Hasting Lodge No. 1965, BPOE*, 398 Mich 467, 480; 247 NW2d 817 (1976) (The Legislature intended that MCL 418.371 is to fairly compensate employees for their loss without providing a "windfall" from the injury). *See, also, Maier v General Telephone Company of Michigan*, 247 Mich App 655; 637 NW2d 263, 268 (2001) ("Additionally, Section 301 is intended to encourage disabled workers to seek employment within their limitations which benefits everyone concerned, including the former employer").

With the clear and recognized legislative intent of Sections 371 and 301 in mind, to construe these sections as limiting an off-set to benefits only applicable if the claimant is an "employee" pursuant to Section 161 in subsequent employment is to create an absurd result, allowing claimants to avoid set-off and receive a wind-fall merely by becoming "self-employed," employed as a "sole proprietor," or as an "independent contractor" to avoid the application of Subsections 371(1) and 301(5). This was not the intent of the Legislature. The Legislature intended to prevent windfalls and double-dipping by the employee. Therefore, it is clear that one need not be an "employee" pursuant to Section 161 to be subject to set-off under Sections 371 and 301.

II. SUBSECTIONS 371(1) AND 301(5) ARE COMPATIBLE STATUTES, EACH OF WHICH MAY BE USED FOR THE SET-OFF THROUGH THE DEDUCTION OF WAGES.

A. MCL 418.371(1) IS APPLICABLE.

The first set-off provision and the provision requested by Defendant, and found applicable by both the WCAC and the Michigan Court of Appeals in this matter, is set forth in MCL 418.371(1), which provides that:

> The weekly loss in wages referred to in this act shall consist of the percentage of the average weekly earnings of the injured employee computed according to this section as fairly represents the proportionate extent of the impairment of the employees earning capacity in the employments covered by this act in which the employee was working at the time of the personal injury. The weekly loss in wages shall be fixed as of the time of the personal injury, and determined considering the nature and extent of the personal injury. The compensation payable, *when added to the employee's wage earning capacity after the personal injury in the same or other employments, shall not exceed the employees' average weekly earnings at the time of the injury* (emphasis added).

By its plain meaning, Subsection 371(1) provides the maximum benefit an injured employee may receive. This Court has expressly stated that the "proviso has no effect on the determination of the basic computation of compensation. It merely allows a sort of set-off against it." *MacDonald v Great Lakes Steel Corp.*, 268 Mich 591, 594; 256 NW 558 (1934).

Courts interpreting "wage earning capacity" have consistently held that an employee's wage earning capacity is that which is essentially within his or her qualifications and training. *See, e.g., Thompson v T.N. Thompson Realtors, Inc.*, 103 Mich App 587; 303 NW2d 41 (1981) (plaintiff was determined to have no wage earning capacity "in the field of common labor"). Moreover,

a claimant need not evidence actual wages in subsequent employment to evidence wage earning capacity. In *Hood v Wyandotte Oil Co.*, 272 Mich 190, 192 (1935), the Court held:

> What is meant by the term 'wage earning capacity after the injury?' It is not limited to *wages actually earned after injury*, for such a holding would encourage malingering and compensation is not a pension. On the other hand mere capacity to earn wages, if "nondescript" by reason of injury, affords no measure unless accompanied by opportunity to obtain suitable employment. Opportunity is circumscribed by capacity of the injured and openings to such a wage earner. *Id.* (emphasis added.)

The Courts have consistently held that, although wages are not the *only* evidence of a wage earning capacity, they do certainly evidence wage earning capacity. Further, while not all post-injury wages prove a post-injury wage earning capacity, wages are a relevant inquiry in making such a determination. In *Sington v Chrysler Corp.*, 467 Mich 144, 648 NW2d 624 (2002), this Court cited with approval the Court's language in *Pulley v Detroit Engineering & Machine Co.*, 378 Mich 418, 423; 145 NW2d 40 (1966), wherein that Court stated:

> The method of determining the employee's earning capacity, as that term is used in the act, is a complex of fact issues which are concerned with the nature of the work performed and the continuing availability of work of that kind and the nature and extent of the disability and the wages earned. *Id.*

In this case, Plaintiff has the wage earning capacity in the health care field as an owner/operator and administrator of a group home. In fact, Plaintiff testified, and the Magistrate found, that her established qualifications and training as a nurse and her experience and training in dealing with the developmentally disabled played a significant role in her ability to obtain a group home license (TI, 94).

In *Leizerman v First Flight Freight Service*, 424 Mich 463, 471-474; 381 NW2d 386 (1985), the Court held that the use of the phrase "wage earning capacity" in Subsection 371(1) was intended to be broader than actual wages earned, but inclusive of them, so that an injured employee who obtains substitute employment, albeit at a reduced earning capacity, shall have his compensation reduced *"pro tanto"* and at the same time malingering would not be encouraged. Thus, under that longstanding interpretation of Subsection 371(1), Plaintiff's continued performance of post-injury work at no wage loss or at a reduced wage loss, permits Defendant to deduct or set-off Plaintiff's earnings from compensation payable.

Ultimately, however, Subsection 371(1) provides a limit on an employer's liability for the payment of wage loss benefits based on Plaintiff's wage earning capacity or actual earnings pursuant to *Leizerman, supra*. Wage earning capacity does not turn on subsequent employment, as wage earning capacity can exist without subsequent employment and subsequent employment may or may not establish a wage earning capacity. *Hood, supra.*

As the above law provides, Plaintiff need not obtain actual "wages" from an "employer" to evidence "wage-earning capacity" entitling Defendant to set-off. It is clear that the WCAC and the Michigan Court of Appeals were correct in finding that Subsection 371(1) was applicable in setting off Plaintiff's benefits based upon her "wage earning capacity" evidenced by the income derived from Mt. Vernon Group Home.

Moreover, as discussed and briefed in Defendant-Appellee's Answer to Plaintiff-Appellant's Application for Leave to Appeal, and *infra*, Plaintiff's earnings from Mt. Vernon Group Home also evidences "wages" which are subject to set-off pursuant to Subsection 371(1).

B. MCL 418.301(5) MAY ALSO APPLY.

This Court has also asked that analysis of the applicability of set-off provisions contained in Subsection 301(5) be provided at oral argument and in briefing in this matter. This request presents a sticky-wicket, so to speak, because of the timing of the issues decided below in this matter.

MCL 418.301(5) may not be found applicable, unless a finding of "disability" is found pursuant to MCL 418.301(4). Specifically, MCL 418.301(4) states:

> As used in this chapter, 'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of a disability does not create a presumption of wage loss.

It is only when a Subsection 301(4) disability is established that the following sections are applicable. Specifically, MCL 418.301(5) states:

> (5) If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows:
>
> > (a) If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal.
> >
> > (b) If an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage which the injured employee is

able to earn after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355.

(c) If an employee is employed and the average weekly wage of the employee is equal to or more than the average weekly wage the employee received before the date of injury, the employee is not entitled to any wage loss benefits under this act for the duration of such employment.

(d) If the employee, after having been employed pursuant to this subsection for 100 weeks or more loses his or her job through no fault of the employee, the employee shall receive compensation under this act pursuant to the following:

(i) If after the exhaustion of unemployment benefit eligibility of an employee, a worker's compensation magistrate or hearing referee, as applicable, determines for any employee covered under this subdivision, that the employments since the time of injury have not established a new wage earning capacity, the employee shall receive compensation based upon his or her wage at the original date of injury. There is a presumption of wage earning capacity established for employments totaling 250 weeks or more.

(ii) The employee must still be disabled as determined pursuant to subsection (4). If the employee is still disabled, he or she shall be entitled to wage loss benefits based on the difference between the normal and customary wages paid to those persons performing the same or similar employment, as determined at the time of termination of the employment of the employee, and the wages paid at the time of the injury.

(iii) If the employee becomes re-employed and the employee is still disabled, he or she shall then receive wage loss benefits as provided in subdivision (b).

(e) If the employee, after having been employed pursuant to this subsection for less than 100 weeks loses his or her job for

> whatever reason, the employee shall receive compensation based upon his or her wage at the original date of injury.

In this matter, Plaintiff was determined, (*pre-Sington*),[5] to be disabled pursuant to MCL 418.301(4). However, as this Court is aware, since the original disability finding in this matter, a change in the law regarding the threshold of Subsection 301(4) was issued by this Court in *Sington, supra.* There, this **Court overruled *Haske v Transport Leasing Inc.*, 455 Mich 628; 566 NW2d 896 (1997)'s interpretation of "disability" pursuant to Subsection 301(4). Specifically, the *Sington* decision disallows a finding of "disability" where an employee is unable to perform a job within his qualifications and training, yet could perform another job suitable to his qualifications and training which is equally well-paying as the job he claims to have been disabled from. *Sington,* 467 Mich 155-156. Specifically, this Court stated:**

> Accordingly, the plain language of MCL 418.301(4) indicates that a person suffers a disability if an injury covered under the WDCA results in a reduction of that person's maximum reasonable wage earning ability in work suitable to that person's qualifications and training.
>
> So understood, a condition that rendered an employee unable to perform a job paying the maximum salary, given the employee's qualifications and training, but leaving the employee free to perform an equally well-paying position suitable to his qualifications and training would not constitute a disability. *Sington*, 467 Mich at 155.

Pursuant to *Sington, supra*, Plaintiff is not disabled under Subsection 301(4), since the facts before the Magistrate indicated that as administrator of the group home, she was indeed performing another job suitable to her qualifications and training (group home owner/operator), equally or better paying than the job from that which she was performing on the date of her injury.

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[5] Pursuant to *Haske v Transport Leasing, Inc.*, 455 Mich 628; 566 NW2d 896 (1997).

Specifically, Plaintiff testified that her qualifications of having been a registered nurse for Defendant and her experience working with the disabled enabled her to obtain her license.

Although, in the lower proceedings, Defendant did not specifically contest Plaintiff's disability, it did contest its duty to continue to pay her benefits. Recently, in *Sweatt v Department of Corrections,* 468 Mich 172; 661 NW2d 201 (2003), the employer contested its duty to pay benefits to a previously employed guard who had committed a felony subsequent to his injury and could no longer be employed by the employer because the employer was legally barred from hiring felons. The issue for the Court was whether the employer must pay differential benefits to the employee pursuant to MCL 418.361(1). The majority of this Court determined that the issue was so interrelated with whether the plaintiff was disabled pursuant to MCL 418.301(4) that the matter must be remanded to the magistrate to redetermine the issue of "disability" pursuant to *Sington.* The dissent criticized the remand because the employer had not specifically raised the issue in the underlying action. Justice Markman, speaking for the majority, addressed the dissent stating:

> The dissent repeatedly states that the magistrate has already determined that plaintiff is disabled. However, the magistrate originally found plaintiff to be disabled as defined in *Haske v Transport Leasing, Inc.*, 455 Mich 628, 634, 566 NW2d 896 (1997). This Court has since overruled *Haske*. See *Sington, supra* at 158, 648 NW2d 624. That is, if the magistrate determines that plaintiff's loss of wage-earning capacity is wholly attributable to his 'commission of a crime,' the magistrate must conclude that plaintiff is not disabled because, under *Sington, supra* at 158, 648 NW2d 624, there must be a link between the work-related injury and the loss of wage-earning capacity . . .
>
> The dissent states that it is inappropriate to remand this case for a redetermination of disability under *Sington* because defendant has never contested plaintiff's disability. (citation omitted). Although defendant has not specifically contested plaintiff's disability, defendant has specifically contested its duty to pay plaintiff

> differential benefits in light of plaintiff's 'commission of a crime.' As explained above, if plaintiff's loss of wage-earning capacity is wholly attributable to his 'commission of a crime,' plaintiff is not disabled under *Sington*. In other words, whether defendant must pay plaintiff differential benefits in light of plaintiff's 'commission of a crime,' and whether plaintiff is disabled, are two interrelated questions that must be addressed on remand. *Sweatt*, 468 Mich at fn13.

So, too, in the instant matter the question of this court regarding the application of MCL 418.301(5) is so interrelated to a determination of disability under MCL 418.301(4), necessarily invoking *Sington*, proper analysis may require a remand to determine if Plaintiff is disabled. If the Magistrate, as Defendant believes he would, concludes that Plaintiff is not disabled, neither MCL 418.301(5) nor MCL 418.371(1) would be applicable because Plaintiff's entitlement **to benefits of any kind will be wholly eliminated when she is determined "not disabled" pursuant to the WDCA.** ***Sington, supra.***

Further, Defendant posits that MCL 418.371(1) and MCL 418.301(5) are compatible provisions for set-off and the applicability of one does not preclude the applicability of the other. Analysis of the plain meaning of each and the timing of the Legislature's enactment and revisions indicates they were intended to be compatible provisions. It bears repeating that Subsection 301(5) states:

> (5) If disability is established pursuant to *subsection* (4), entitlement to weekly wage loss benefits shall be determined pursuant to this *section and* as follows. (Emphasis added).

At the time that the Legislature enacted MCL 418.301, it also amended MCL 418.371. Importantly, the simultaneous nature of the Legislature's actions indicate they intended the provisions to be compatible and equally applicable to provide set-off to the employer.

Moreover, a "plain language" interpretation of this statute[6] indicates that Subsection 301(5) intended to encompass other provisions in the WDCA, including Section 371. Specifically, Subsection 301(1) states:

> An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided *in this act*. MCL 418.301(1). (Emphasis added).

Subsection 301(5) specifically encompasses the provision of Subsection 301(1) that compensation shall be paid "as provided *in this act"* when Subsection 301(5) states "entitlement to weekly wage loss benefits shall be determined pursuant to this *section*," necessarily invoking Subsection 301(1). Hence, this then implicates the provisions of MCL 418.371.

Significantly, unlike Subsection 371(1), the provisions of Subsection 301(5) require actual employment or the refusal of a bona fide offer of reasonable employment for a potential set-off to occur. As argued above, Defendant in this case does not need to rely on Subsection 301(5) given that Plaintiff has a wage earning capacity which is in excess of her average weekly wage at the time of the injury. However, since Plaintiff has opted to run a group home subsequent to her work-related injuries, Subsection 301(5) is also an available provision for the set-off in this case.

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[6] "Where statutory language is clear and unambiguous, its plain meaning reflects legislative intent, and judicial construction is not permitted." *Michalski v Bar-Levav*, 463 Mich 723, 731; 625 NW2d 754 (2001). See also, e.g., *Nawrocki v Macomb Co. Rd. Com'n.*, 463 Mich 143, 159; 615 NW2d 702 (2000) ("[i]t is a fundamental principle of statutory construction that the words used by the Legislature shall be given their common and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent"); *Helder v Sruba*, 462 Mich 92, 99; 611 NW2d 309 (2000) ("[w]hen statutory language is clear and unambiguous, the court must honor the legislative intent as clearly indicated in that language and no further construction is required or permitted").

Clearly, however, MCL 418.301(5)(a) does not apply, and Defendant has never argued that Plaintiff refused a bona fide offer of reasonable employment. In fact, Plaintiff is working. Furthermore, Subsection 301(5)(b) would only apply in situations where Plaintiff's subsequent employment paid her less than her average weekly wage with Defendant. That is not the case here since Plaintiff earned in excess of her average weekly wage in both years at issue at trial (1997 and 1998). However, to the extent that Plaintiff's wages dropped below her pre-injury average weekly wage, Subsection (b) would apply.

Thus, in this case, Subsection 301(5)(c) is applicable since Plaintiff is earning wages which have always exceeded her average weekly wage. Defendant would, therefore, be entitled to a full set-off.

However, the provisions of Subsection 301(5) do not take into account Plaintiff's already established "wage earning capacity" pursuant to her testimony. In fact, once Subsection 301(5)(b) or (c) is deemed to apply, Defendant might still be required to pay full benefits to Plaintiff if Plaintiff loses that job pursuant to Subsections 301(5)(d) and (e), which discusses presumptions regarding the establishment of a new wage earning capacity depending on the length of time Plaintiff has been performing the subsequent employment. This, however, may also be a meaningless distinction in this case because Plaintiff has presumably continued to operate the group homes since June of 1997. Since it is now August of 2004, Plaintiff has been involved in this activity for more than 250 weeks and is presumed to have established a new wage earning capacity. MCL 418.301(5)(d)(i).

For the aforementioned reasons and those contained in Defendant's prior briefing in this Court, either MCL 418.371(1) or MCL 418.301(5) may be used to set off the benefit to Plaintiff,

but Defendant believes that MCL 418.371(1) is the most applicable and appropriate provision for this instant matter.

III. INCOME EARNED FROM PLAINTIFF'S BUSINESS CAN BE BOTH WAGES AND WAGE EARNING CAPACITY.

As discussed in Argument II above, it is clear that Plaintiff's earnings from Mt. Vernon Group Home evidence her "wage earning capacity." MCL 418.301(5)(b) and (c) take into consideration "average weekly wages" for the purpose of the set-off contained in that Section of the WDCA. In MCL 418.371, the Legislature has defined "average weekly wage" for purposes of the entire WDCA to mean wages earned "in all employment." As discussed in Argument I, it is an unreasonable interpretation of the statute to limit the computation of wages to employment in which the claimant is an "employee" pursuant to MCL 418. 161. Further, as discussed above, Plaintiff's activities at Mt. Vernon Group Home evidence employment, and her earnings for purposes of Subsection 301(5) constitute wages.

Therefore, Plaintiff's earnings from Mt. Vernon Group Home are both "wage earning capacity" and "wages" for purposes of the set-off provisions discussed above.

IV. PLAINTIFF'S WAGES AND/OR WAGE EARNING CAPACITY ARE THE NET EARNINGS FROM MT. VERNON GROUP HOME.

In this matter, Plaintiff's wages and/or wage earning capacity are the net earnings reported on her federal tax return based upon income derived from the Mt. Vernon Group Home. Defendant does not assert that Plaintiff's investment income is the subject of set-off; however, the earnings reported on her federal tax returns establish active income, not passive investment earnings.

As the WCAC pointed out when it decided this case, after extensive research, it could find only one case directly on point (WCAC Opinion, p. 18). The case identified by the WCAC was *State ex rel Richards v Industrial Commission of Ohio*, 110 Ohio App 3d 109; 673 NE2d 667 (1996). In that case the Ohio appellate court addressed the issue of calculating the earnings of an injured employee who returned to work in his own business. There, the plaintiff was a realtor who sustained an injury in the course of his employment and was awarded temporary total disability. He subsequently returned to employment in his own business of selling and installing garage doors. *Id.*

The *Richards* court held that plaintiff's net earnings in his garage door business could be set off against his former wages, stating:

> Preinjury, realtor was an employee with income attributable to him only as a reward for his labor not from the gross revenue of his employer. Post injury, realtor was the employer, with gross revenue of his business attributed to him. However, realtor had no more access to the gross revenues of his business than he did to the gross revenues of his previous employer. . . . Realtor's real income, or his 'wage' from the business, is the *net* income from his operation (emphasis in original).

Subsequent to the *Richards* decision, the Court of Appeals in *George v Burlington Coat Factory*, 250 Mich App 83; 645 NW2d 722 (2002) affirmed the decision of the WCAC, which held that a magistrate should have taken into account plaintiff's subsequent earnings from an insurance business he opened subsequent to his injury. Significantly, in determining the weekly value of plaintiff's earnings at the insurance business, the WCAC took plaintiff's net earnings for the year of $15,738.00 and divided them by 52, which "worked out" to $302.65 per week. *George v Burlington Coat Factory*, 1998 ACO #384 (attached as Appendix A).

Further, in *Alkiefy v DaimlerChrysler Corp.*, 2004 ACO #107 (attached as Appendix B), the WCAC again affirmed the magistrate's determination that plaintiff's earnings as a self-employed taxi driver were to be set off against the wage loss benefits paid by defendant. In that case, plaintiff's net earnings were again used. He testified that he earned approximately $150.00 to $200.00 per week but that he only netted, after paying for his taxi, $15.00 per day. The magistrate awarded the set-off at $15.00 per day, or $105.00 per week, and the WCAC affirmed.

Furthermore, the Court of Appeals, in interpreting the favored work doctrine applied by Subsection 371(1) and subsequently codified by Subsection 301(5), in *Thompson, supra*, used the earnings of a principal shareholder in a family corporation to be set off against the workers' compensation liability, despite the fact that they were diverted to "keep creditors at bay."

Additionally, the WCAC recently found that a claimant's subsequent operation of his own business could act to establish a wage earning capacity pursuant to Subsection 301(5). *Webb v Monroe County Road Commission*, 2003 ACO #197 (2003) (attached as Appendix C).

In this case, Plaintiff's assertion that some component of her net income from the group homes reflects her ownership of the buildings is belied by the undisputed record, as well as the WCAC's affirmation of the magistrate's denial of credit to Defendant for Plaintiff's income from rental properties.

Specifically, Plaintiff testified that Mt. Vernon Group Home, Inc., pays rent to her on the houses that she owns and which the corporation uses, just as she collects rent from other properties not occupied by her group homes (TI, 48). In fact, Plaintiff's 1998 income tax return for Mt. Vernon Group Home, Inc., indicates that the corporation paid $21,500.00 in rent for that year. This amount, along with other costs and expenses (such as salaries and wages) was deducted

from the corporation's gross revenues of $218,043.00 in order to arrive at her net income from operations of $87,474.00, a weekly wage of $1,682.19 for 1998. Using the same calculation, Plaintiff's net income for the year 1999 was $60,321.00, and the weekly wage was $1,160.02.

Consequently, there is no merit to Plaintiff's claim that a remand is necessary in order to apportion her net business income to either her role in providing staff to the group homes or her role in providing the buildings to the group homes.

V. PLAINTIFF'S ACTIVITIES AND OPERATION OF THE MOUNT VERNON GROUP HOME ESTABLISHES WAGE EARNING CAPACITY IN THE "SAME OR OTHER EMPLOYMENTS."

This issue has been briefed in Arguments I and II. As indicated in these Arguments, Plaintiff's activities and operations of the Mt. Vernon Group Home establishes wage earning capacity in the "same or other employments."

CONCLUSION

For the aforementioned reasons and those reasons more fully stated in Defendant-Appellee's Answer to Plaintiff-Appellant's Application for Leave to Appeal, it is clear that Defendant-Appellee was entitled to set-off in this matter, and this matter is not one requiring review of this Court. Defendant-Appellee respectfully requests that this Honorable Court DENY Plaintiff-Appellant's

Application for Leave to Appeal for lack of merit in the grounds presented and/or peremptorily affirm the decision of the Court of Appeals in this matter.

Respectfully submitted,

KELLER THOMA, P.C.

By:_____

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Dated: September 2, 2004
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STATE OF MICHIGAN
IN THE SUPREME COURT

JEANNETTE GORDON,

Plaintiff-Appellant

vs.

HENRY FORD HEALTH SYSTEM,

Defendant-Appellee.
/

SC No. 125335

COA No. 244596

WCAC
LC No. 01-000173

PROOF OF SERVICE

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

The undersigned, being first duly sworn, deposes and states that she is an employee of the law firm of KELLER THOMA, P.C., and that on the 2nd day of September, 2004, she did serve one copy of Defendant-Appellant Henry Ford Health System's Supplemental Brief on Appeal and this Proof of Service by mailing same via United States Mail, as follows:

Richard J. Ehrlich, Esq.
23077 Greenfield, Suite 557
Southfield, MI 48075

Daryl Royal, Esq.
22646 Michigan Avenue
Dearborn, MI 48124

Lisa MacMillan

Subscribed and sworn to before me
this 2nd day of September, 2004.

Sherry A. Dockery, Notary Public
State of Michigan, County of Wayne
My commission expires on 03/11/07
Acting in the County of Wayne

A

1998 ACO #384

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

RAJAN K. GEORGE,
PLAINTIFF,

V DOCKET #95-0993

BURLINGTON COAT FACTORY WAREHOUSE
OF SOUTHFIELD, HOME INSURANCE COMPANY, AND
PLANET INSURANCE COMPANY,
DEFENDANTS.

REMAND FROM THE MICHIGAN COURT OF APPEALS.

FREDERICK B. BENJAMIN FOR PLAINTIFF,
GERALD M. MARCINKOSKI FOR DEFENDANT BURLINGTON COAT FACTORY WAREHOUSE OF SOUTHFIELD AND HOME INSURANCE COMPANY, AND
PAUL F. PATERNOSTER FOR DEFENDANT BURLINGTON COAT FACTORY WAREHOUSE OF SOUTHFIELD AND PLANET INSURANCE COMPANY.

OPINION

WYSZYNSKI, COMMISSIONER

Previously, this Commission affirmed, with modification, Magistrate Susan B. Cope's decision, mailed December 5, 1995, granting an open award.[1] Having determined that Mr. George's post-injury wage-earning capacity exceeded pre-injury wage-earning capacity, we modified the magistrate's award to reflect a weekly benefit rate of zero. The Court of Appeals vacated this decision and remanded for consideration in light of *Haske v Transport Leasing, Inc, Indiana*,[2] and further directed that we set forth our reasoning regarding whatever amount of earnings we find based upon George's life insurance business.[3]

In *Haske*, the Court set forth a three-part test for disability. First, there must be a work-related injury. Second, there must be a loss in actual wages subsequent to the injury. And, third, there must be a causal link between the injury and the wage loss. The Court summarized its holding as follows:

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[1] 1997 ACO #348.

[2] 455 Mich 628 (1997).

[3] Unpublished order of the Court of Appeals, issued February 25, 1998 (Docket No. 204629).

> We hold that an employee proves a disability where he proves he can no longer perform a job suitable to his qualifications and training as a result of his injury. An employee's disability is compensable only where he proves wages loss by showing a reduction in earning capacity. An employee establishes a reduction in earning capacity where he establishes to the fact finder's satisfaction that a reduction or elimination of his wages, subsequent to the work-related injury, is causally linked to the work-related injury.

The Court explained that an employer could refute the causal connection between the partial disability and the claimant's unemployment with evidence that there are other factors to explain the cause of the unemployment such as malingering or ailments unrelated to the previous employment.[4]

In her opinion, Magistrate Cope found that Mr. George failed to prove by a preponderance of the evidence that he left his subsequent employments for physical reasons. In so doing, she relied upon medical testimony from two experts that he was capable of doing that type of sedentary office work.

We again affirm the magistrate's decision finding Mr. George partially disabled, but we do not believe Mr. George has carried his burden of proving a compensable disability under *Haske* in that he has not established a link between his injury and his wage loss.

Next we turn to the Court's instruction that we explain our reasoning regarding the amount of earnings we find based upon Mr. George's life insurance business.

Based upon stipulations, the magistrate calculated Mr. George's benefits rate to be $22.91. The parties agreed that the average weekly wage from Burlington was $396.44 and that at Contempra, one of Mr. George's post-injury jobs, the average weekly wage was $354.96. Taking the after tax amounts of $307.52 from Burlington minus the $278.88 after tax amount from Contempra equals $28.64. $28.64 multiplied by 80 percent results in a benefit rate of $22.91.

However, testimony from Mr. George himself established that he contemporaneously worked as an independent contractor selling insurance. When he produced his 1994 income tax form, admitted at the hearing below as defendant's exhibit D, it revealed a gross income from the insurance business of $15,378.

MCL 418.361(1) provides in pertinent part:

> While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which

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[4] 455 Mich at 661, n 38.

> the injured employee is ***able to earn*** after the personal injury, not more than the maximum weekly rate of compensation, as determined under section 355. [Emphasis Supplied.]

Mr. George's federal income tax return for 1994 establishes that he was able to earn $15,738 from his life insurance business in addition to his earnings from his other post-injury jobs. The record does not establish how many weeks in 1994 Mr. George spent on his life insurance business, but if $15, 738 is divided by 52 weeks, that works out to $302.65 per week. Doing the computation as required by §371(2), this works out to be the average weekly wage. As noted above, it was stipulated that the average weekly wage earned post injury at Contempra was $354.96. Add this to the $302.65 average weekly wage from the insurance business and you have a combined average weekly wage of $657.61. The combined average weekly wage, what Mr. George was actually able to earn after his injury, exceeds his $396.44 average weekly wage from Burlington by $261.17. Under §361(1), Mr. George is not entitled to weekly benefits because his post-injury average weekly wage exceeds his pre-injury average weekly wage.

We again modify the magistrate's decision to reflect a weekly benefit rate of zero.

Commissioners Miller and Skoppek concur.

James Edward Wyszynski, Jr.

Donald G. Miller, Chairperson

Jürgen O. Skoppek Commissioners

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

RAJAN K. GEORGE,
PLAINTIFF,

V

DOCKET #95-0993

BURLINGTON COAT FACTORY WAREHOUSE
OF SOUTHFIELD, HOME INSURANCE COMPANY, AND
PLANET INSURANCE COMPANY,
DEFENDANTS.

This cause returns to the Appellate Commission on remand from the Michigan Court of Appeals, from the decision of Magistrate Susan B. Cope, mailed December 5, 1995, granting an award for partial disability. The Commission has considered the record and briefs of counsel, and believes that the magistrate's decision should be affirmed with modification. Therefore,

IT IS ORDERED that the decision of the magistrate is modified to reflect a weekly benefit rate of zero. In all other respects, the magistrate's opinion is affirmed.

James Edward Wyszynski, Jr.

Donald G. Miller, Chairperson

Jürgen O. Skoppek Commissioners

B

2004 ACO #107

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

ABDO A. ALKIEFY,
PLAINTIFF,

V DOCKET #03-0031

DAIMLERCHRYSLER CORPORATION,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE RABAUT.

PAUL S. ROSEN AND DARYL ROYAL FOR PLAINTIFF,
GERALD M. MARCINKOSKI FOR DEFENDANT.

OPINION

WILL, COMMISSIONER

This matter was heard on several dates in July, August and September, 2002 by Magistrate Rabaut. The plaintiff was the only lay witness to testify. Haranath Policherla, M.D., plaintiff's treating physician testified on plaintiff's behalf at depositions held on August 22, 1996 and December 18, 2001. Lucius C. Tripp., M.D., testified on defendant's behalf on January 10, 2002.

On December 26, 2002 Magistrate Rabaut granted plaintiff an open award. Defendant filed a timely Claim for Review. Defendant argued in its brief filed April 11, 2003.

> **THERE IS NO COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD TO SUPPORT THE MAGISTRATE'S FINDING THAT PLAINTIFF SUFFERS FROM A CONTINUING WORK-RELATED DISABILITY AS A RESULT OF HIS 1993 INJURY. PLAINTIFF RETURNED TO WORK AT HIS REGULAR JOB AFTER THAT INJURY, WORKED FOR A SUBSEQUENT EMPLOYER, VISITED YEMEN FOR A YEAR, AND ADMITTED IN 1999 THAT HE HAD NOT A SEIZURE FOR "A COUPLE OF YEARS." FURTHERMORE, THE RECORD REVEALS THAT PLAINTIFF WAS NOT A CREDIBLE WITNESS AND HIS DOCTOR OVERSTATED PLAINTIFF'S CASE WHEN CONTRASTED WITH UNDENIABLE FACTS IN THE RECORD.**

> At page 4 of its brief the defendant said:
>
> The Magistrate's factual findings are valid if supported by competent, material and substantial evidence on the whole record. MCL 418.861a(3). Put differently,

where, after a "qualitative and quantitative" review of the whole record, there is inadequate evidence to support the Magistrate's factual findings, the Commission must reverse. MCL 418.851a(13). Where the Magistrate's decision rests, as here, in part on plaintiff's credibility, the Commission can reverse such credibility determination should it conflict with too many undisputed facts in the record. Compare, *Motdoch v Sea Ray Boats*, 1994 ACO #15, *Bauer v City of Westland Police Department*, 1992 ACO #434. With these points in mind, the Commission should reverse the Magistrate's decision because it is not based on competent, material, and substantial evidence on the whole record.

We agree with the defendant's description of our role in the Appellate process. Accordingly, we have conducted the qualitative and quantitative review of the entire record that the statute demands and have concluded that the decision of the magistrate is supported by competent, material and substantial evidence on the whole record. Certainly the magistrate's finding that plaintiff is credible is extremely important in any case where the issue is continuing disability. This is such a case.

At pages 4 through 8 of its April 11, 2003 brief, defendant points to conduct and activities on plaintiff's part that would, in defendant's view, undermine plaintiff's credibility. We agree that the magistrates has a duty to consider these activities in accessing plaintiff's credibility. We believe that the magistrate has in fact considered the conduct and activities discussed by defendant in his deliberations pertaining to plaintiff's credibility. Accordingly, we do not disturb his finding pertaining to credibility.

We believe the magistrate has done an excellent job in this case of evaluating the medical and lay testimony so that it is not difficult for this Commission to determine that his decision is supported by competent, material and substantial evidence on the whole record.

> On October 22, 1999, Gerald F. Robbins, M. D., examined plaintiff at the request of defendants. Dr. Robbins authored two reports which were admitted as Plaintiff's Exhibit 6. Based on his examination and review of records, Dr. Robbins felt that plaintiff should not work around machinery or at heights.
>
> Plaintiff continued to receive workers' compensation benefits. In January of 2001, plaintiff began driving a taxi cab for the Checker Cab Company. Plaintiff testified that he was "Sick of sitting at home." His father and uncle were sick in Yemen, and he wanted to help. Additionally, he testified that he was in debt and needed work.
>
> Plaintiff testified that he drove the cab for about three month. He guessed that he averaged earnings of $150.00 to $200.00 per week. Plaintiff estimated that, after paying for the taxi, his wages were approximately $15.00 per day. He testified that he basically worked around Detroit Receiving Hospital to pick up fares three to five days per week He also let friends drive the cab. Plaintiff, however, continued to receive and accept full workers' compensation benefits from defendant without informing defendant of his new employment. Additionally, he failed to declare the wages he made for income tax purposes.

Plaintiff admitted that he was able to take cab fares, make change, think about directions, and perform all other mental tasks associated with driving a cab. However, he testified that he did not know how to work the computer.

On March 15, 2001, plaintiff returned to the plant clinic. According to the clinic note admitted as Plaintiff's Exhibit 7, plaintiff still required restrictions per Dr. Policherla's report.

On April 16, 2001 plaintiff was involved in a motor vehicle accident while driving his cab. Plaintiff could not remember the accident well. He testified that, while making a U-turn to pick up a passenger, he thought he was struck from behind and hit a light pole. He testified however, that upon examining the cab, there was no damage to the rear end. Plaintiff, therefore believes that he "blacked out" and struck the light pole.

Plaintiff went to Henry Ford Hospital via ambulance and was treated for back, hip, arm and chest injuries. He testified that he did not sustain any head injuries in the crash. The Henry Ford Hospital records for that emergency room visit were admitted as Defendant's Exhibit C. They supported plaintiff's testimony that he did not sustain any head injury in the accident.

Plaintiff filed a Driver's Accident Report with Checker Cab. This report was admitted as Defendant's Exhibit D. Again, it basically supports plaintiff's testimony. Plaintiff filed for no-fault benefits related to that accident. He testified that "Mario from Checker Cab gave him the form and told him to fill it out. He testified that he never received these benefits. The Application was admitted as Defendant's Exhibit E. Plaintiff appeared very evasive on questioning regarding this issue.

Plaintiff testified that he has not driven a cab since that time although he has ridden in it with family members who use it to make money. Plaintiff admitted that he should have told defendant about the subsequent employment. Additionally, plaintiff admitted that he should never have driven a cab given his condition, and he apologized for endangering peoples' lives.

Plaintiff continued to receive workers' compensation benefits; however, those benefits were terminated after he was examined by Lucius Tripp, M.D., board certified in Occupational Medicine, at the request of defendant on May 16, 2001. A transcript of Dr. Tripp's deposition testimony was admitted as Defendant's Exhibit A. Plaintiff's history to Dr. Tripp regarding the incident is essentially similar to his testimony at trial (Tripp, 16).

Dr. Tripp admitted that he is not board certified in neurology or neurosurgery (Tripp, 29). Dr. Tripp admitted that plaintiff had at least four abnormal EEG's but did not feel that they revealed "seizure" (Tripp, 37). He admitted that an EEG or clinical examination could be normal if a patient was not having a seizure at the time (Tripp, 38). He admitted that a head injury can cause a seizure disorder (Tripp, 47).

I find Dr. Tripp's testimony that people with seizure disorders should not drive cabs but could work around moving machinery to be completely incredible (Trip, 58). By that point in his deposition, it was absolutely clear that he was interested only in relieving defendant of any liability in this case rather than giving an unbiased "independent" medical opinion.

Based on a clinical examination and review of records, Dr. Tripp felt that plaintiff "experienced a closed-head injury in 1993 with subsequent headaches and dizziness." However, he felt that there was "no history of post-trauma seizures since 1993." Dr. Tripp felt that plaintiff could return to work without restrictions or further treatment (Tripp, 23).

Dr. Policherla last examined plaintiff on June 11, 2001 (Policherla II, 45). At that time, plaintiff's presentation was essentially unchanged. Dr. Policherla felt that plaintiff was totally disabled due to the "explosive nature of his headache and unpredictable dizziness as well as active epileptic focus and breakthrough seizures as described" (Policherla II, 46). Dr. Policherla continued prescribing anticonvulsant medication.

In fact, Dr. Policherla testified that plaintiff was actually getting worse due to the brain "learning" the epileptic focus on the right side as well (Policherla II, 51-52). Ultimately, Dr. Policherla testified that he would not allow plaintiff to work for the reason that plaintiff

> has explosive headaches and he has seizures which is unpredictable and which are poorly controlled, active epileptic focus. He's not only a danger to himself, but [to] people around [him] (Policherla II, 56).

Since his last day of work, plaintiff continues to experience dizziness and headaches to a greater degree. He testified that the problems are worse in the summer. Unfortunately, the medication to relieve symptoms nauseates him. Plaintiff does not feel he could have returned to work at any time, even in May of 2001, due to headaches, dizziness and seizures. He testified that he cannot safely work around machines or near the assembly line.

Plaintiff testified that he wants to be able to return to work with defendant since it is the highest paying job he has had. He testified that defendant never offered him a "recycling job." Plaintiff went for a disability pension examination with defendant on November 1, 2001.

Plaintiff was denied a PTD pension after an examination on November 1, 2001. Those records were admitted as Defendant's Exhibits F and H.

He credibly testified that he had no other training or skills despite his work at a printing shop in Kuwait in the 1960's. I find that plaintiff's ability to run a printing press in Kuwait in the 1960's does not translate to any ability to work in a printing shop in the United States in the 21st. Century.

Plaintiff was required to sustain his burden of proof by a preponderance of the evidence. MCL 418.851; MSA 17.237 (851): *Aquilina v General Motors Corp*, 403 Mich 206; 267 NW2d 923 (1978). In order to establish a work-related disability, plaintiff must demonstrate that he has a limitation of his maximum wage-earning capacity in work suitable to his qualifications and training. MCL 418.301(4); MSA 17.237(301)(4); *Sington v Chrysler Corp.*, 467 Mich 144, 154; 648 NW2d 624 (2002). Plaintiff succeeded.

I find that plaintiff was a credible witness. His unrebutted testimony established that on July 29, 1993, while walking in the plant, he slipped and fell on some stairs striking his head. I further accept plaintiff's credible testimony that, as a result of that incident, he sought treatment with Dr. Policherla.

I accept plaintiff's testimony regarding his current symptoms in its entirely. I adopt Dr. Policherla's testimony regarding plaintiff's condition in its entirely. I find that his testimony most appropriately explains plaintiff's credible complaints. I reject the testimony of the "independent" medical examiner, Dr. Tripp. I found Dr. Tripp not credible and find that his bias permeated his testimony to the point that it rendered it useless.

I accept Dr. Policherla's testimony that plaintiff's explosive headaches and seizure disorder are directly related to his slip and fall at work. I also accept Dr. Policherla's testimony that plaintiff's condition is getting worse despite treatment.

I accept Dr. Policherla's testimony that plaintiff has been and remains unable to perform the duties of his job as a result of his work related injury. I accept plaintiff's credible testimony that he cannot perform the duties of his job due to his headaches and seizures and find that plaintiff cannot safely work around moving machinery. Further, I find that plaintiff has absolutely no residual wage earning capacity.

I find that, given his limited education, limited grasp of the English language, and due to the length of time since he has performed any other job other than his paint line job, plaintiff has established that he is disabled from performing any job within his qualification and training. I find specifically that he has no other qualifications or training. I find specifically that he has no other qualifications or training in jobs that would be within his restrictions.

I find that defendant is entitled to recoup money earned by plaintiff as a Checker Cab driver. I find that plaintiff earned $15.00 per day or $105.00 per week during plaintiff's "career" as a cab driver pursuant to plaintiff's credible testimony.

> Furthermore, I find that plaintiff is disabled from performing even that job due to his headaches and seizure disorders. I accept plaintiff's testimony that he should not have been driving the cab as it is consistent with Dr. Policherla's continuing restrictions. The mere fact that plaintiff performed that job for short period without killing himself or someone else does not establish that plaintiff has a wage earning capacity in that job.[1]

Accordingly, we find that the decision of the magistrate is supported by competent, material and substantial evidence on the whole record. We affirm the decision of the magistrate.[2]

Commissioners Kent and Glaser concur.

Rodger G. Will

James J. Kent

Martha M. Glaser Commissioners

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[1] Magistrate's decision pgs. 6-9.

[2] We have not considered plaintiff's brief because it did not arrive on a timely basis nor was a timely extension of time to file the brief requested.

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

ABDO A. ALKIEFY,
PLAINTIFF,

V

DOCKET #03-0031

DAIMLERCHRYSLER CORPORATION,
SELF INSURED,
DEFENDANT.

This cause came before the Appellate Commission on defendant's appeal from Magistrate John J. Rabaut's decision, mailed December 26, 2002, granting plaintiff an open award. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be affirmed. Therefore,

IT IS ORDERED that the magistrate's decision is affirmed consistent with the attached opinion.

Rodger G. Will

James J. Kent

Martha M. Glaser Commissioners

C

2003 ACO #197

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

DAVID L. WEBB,
PLAINTIFF,

V DOCKET #02-0230

MONROE COUNTY ROAD COMMISSION,
SELF INSURED, AND
SIF/PERMANENT & TOTAL DISABILITY PROVISION,
DEFENDANTS.

APPEAL FROM MAGISTRATE BRENNAN.

RODGER G. WILL FOR PLAINTIFF,
WILLIAM T. BUIE FOR DEFENDANT MONROE COUNTY ROAD COMMISSION, SELF INSURED,
RAY W. CARDEW, JR. FOR DEFENDANT SIF/PERMANENT AND TOTAL DISABILITY PROVISION.

OPINION

WITTE, COMMISSIONER

This matter is before the Commission on appeal by defendant Monroe County Road Commission, Self Insured, and on cross appeal by plaintiff David Webb from the decision of Magistrate Mary C. Brennan, mailed May 2, 2002, in which she granted plaintiff an open award for work-related injury to his legs, but denied his petition for total and permanent loss of the industrial use of his legs.[1]

Defendant Monroe County Road Commission alleges that plaintiff "failed to establish that he suffered from a work related disability pursuant to the Supreme Court's recent ruling in *Sington v Chrysler" Corp*, 467 Mich 144 (2002), and that "the magistrate erred by awarding full benefits where plaintiff established a new wage earning capacity."[2] Plaintiff alleges he suffered "the permanent loss of the industrial use of both lower extremities within the period prescribed by law."[3]

We remand for a *Sington* analysis and for a determination whether plaintiff established a new wage earning capacity. *Sington v Chrysler Corp*, 467 Mich 144 (2002); MCL 418.861a(3), 301(4), 301(5) and 361(3)(g). In all other respects the decision is affirmed.

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[1] This matter has been ready for review since January 7, 2003.

[2] Defendant's brief, 1.

[3] Plaintiff's brief, i.

The magistrate found that plaintiff, a mechanic and a welder, was injured December 10, 1983 when, "while moving tandem tires and a brake drum, he felt a sudden, intense pain in his low back and into his right leg."[4] He returned to work in 1985 but the severe back pain returned. He underwent back surgery during 1986 and, after six months, returned to welding work only. He left work on July 6, 1987 when the back pain increased to the point he could not bear it. He has not performed unrestricted work since that time. He underwent a second back surgery in March 1988. Plaintiff testified that "since the surgery he has not been able to walk long distances, and is able to stand for only a few minutes. His legs go numb; his right leg buckles. He has constant pain in his back and through his right leg."[5]

The magistrate described plaintiff's post-injury employment:

> In 1990 plaintiff began sharpening scissors as a hobby and eventually established a scissor sharpening business, Dave's Scissor Sharpening. Plaintiff testified that he had a work table set up in a van and would drive in the van from shop to shop, sharpening scissors. He stated that his employees would go into the shops to get the scissors and bring them to him while he remained seated in the van. His wife who kept the books and made his appointments also assisted him. Unfortunately, plaintiff's wife died in 1997 and he has been unable to maintain the business on his own since her death. Plaintiff testified that he has been out of business since the end of 2000. He explained that the work became too demanding and required too much walking which he was unable to do.
>
> On cross-examination plaintiff testified that he began the scissor sharpening business in 1990 but did not actually make a profit for three to four years. Sometime in 1992 or 1993 he began going into small businesses to offer his services. He testified that his workday varied depending on his schedule and how he felt, and he did what he felt physically able to do. In addition he was always able to lie down in his van during the day. He estimated that he worked at least two to eight hours per day from 1994 through 2000. In most years his gross income exceeded $60,000.[6]

The magistrate noted the plaintiff's activities since he closed the scissor sharpening business:

> In 2000 plaintiff moved to North Carolina and is no longer working in any capacity. Plaintiff lives alone and does most of the maintenance on his home. He is able to maintain his own household and takes care of his own personal needs. He is able to drive and did drive to Michigan from North Carolina, although he took frequent breaks.

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[4] Magistrate's decision, 2.

[5] *Id*, 3.

[6] *Id*. While plaintiff's average weekly wage for his dates of injury were $408.81 and $467.97, his gross income from his scissors sharpening business was much higher. After losing money for a couple years, his income was as follows: 1994 - $68,000, 1995 - $73,000, 1996 - $64,000, 1997 - $67,000, 1998 - $60,000, 1999 - no amount is provided, and 2000 - $67,000. (Trial transcript I, 60.)

> Before moving to North Carolina, plaintiff's Michigan home was situated on a one-acre lot that he was also able to maintain. He also owned two rental properties in Michigan, one of which he sold two days prior to the hearing.[7]

When Dr. Terry Weingarden examined plaintiff on October 1, 1996, while plaintiff was still operating the scissor-sharpening business, the doctor concluded that "plaintiff maintained the strength in his lower extremities, and that he had not lost the function of his lower extremities."[8]

The magistrate made the following findings concerning the three examinations made by Dr. Shlomo Mandel, conducted October 28, 1997, July 6, 1999 and September 11, 2001, and the single examination conducted by Dr. Jack Belen on May 24, 2001:

> . . . [F]or the 1997 visit . . . [Dr. Mandel] . . . summarized plaintiff's condition as postoperative pain and neurologic deficits, and recommended conservative care. Dr. Mandel observed that plaintiff's daily activities were "significantly limited" but declined to find that he was unable to perform regular lawn care or chores.
>
> When plaintiff saw Dr. Mandel in July 1999, . . . plaintiff complained of pain radiating into both legs, and told Dr. Mandel that he was no longer able to mow his lawn or clean his home. Dr. Mandel's clinical findings were the same except for the added notation that plaintiff demonstrated difficulty walking on his right heel. He stated that he reviewed an EMG dated July 1999 that was normal, and a 1999 CT scan which revealed several significant findings including protruded or herniated discs at L4-5 and L5-S1, postoperative fibrosis, canal stenosis, laminectomy defects, and hypertrophic changes. Dr. Mandel noted that plaintiff's condition was not improving and that his complaints were increasing. He concluded that plaintiff could not return to heavy work as a mechanic and recommended that he avoid "unnecessary bending, twisting, squatting, or lifting over 10 to 15 pounds on a repetitive basis."
>
> Dr. Mandel examined plaintiff for a third and final time on September 12, 2001. His clinical findings were essentially unchanged although they also included weakness in the right quad. He continued to find plaintiff disabled and recommended that the restrictions set forth in his prior report be maintained.
>
> On direct examination, Dr. Mandel . . . noted that plaintiff was working at the scissor, sharpening business in 1997 and 1999 and opined that he was able to work in the same capacity in 2001. He maintained that plaintiff retained essentially normal innervation supply to the legs, and normal neuromuscular functioning of the lower extremities, and specifically that plaintiff retained some, albeit restricted, use of his legs in industry.

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[7] *Id.*

[8] *Id.*

Dr. Jack Belen examined plaintiff on May 24, 2002. . . . He concluded that plaintiff was limited to only the most sedentary type of work with a sit/stand option. Dr. Belen opined that plaintiff's condition was permanent and that it became permanent at the time he required the second surgery. On cross-examination, Dr. Belen conceded that some of his findings were different than those made by physicians in prior examinations and represented a worsening of plaintiff's condition.[9]

Based on these findings the magistrate made the following conclusions:

Upon consideration of the evidence presented, I find that plaintiff sustained an injury to his low back in December 1983 and on July 6, 1987. I find that due to the 1987 injury he is disabled within the meaning of the act. MCL 418.301(4). Although defense counsel did not stipulate to disability, the medical evidence is uncontroverted and overwhelmingly establishes that plaintiff is unable to return to unrestricted work. However, it is the extent of the disability that remains at issue.

Plaintiff claims that he is totally and permanently disabled due to the industrial loss of use of his legs. MCL 418.351(3)(g). The permanent and total loss of industrial use occurs where there is an employment-related injury to one or both legs that prevents the use of both legs in industry or where the use of the legs, even if not injured, triggers an employment-related injury in another part of the body that ultimately prevents the use of the legs in industry. *Burke v Ontonagon County Road Comm,* 391 Mich 103 (1974). Although the claimant may file a claim for total and permanent disability at any time, he or she bears the burden of establishing that the loss of industrial use began before the expiration of 500 weeks less 30 days from the date of injury. Section 361(3)(g); *Sullens v Ford Motor Co,*____Mich App____(Docket No. 227185; rel'd 3/23/01). In the instant case, plaintiff's injury occurred on July 6, 1987; accordingly, he must establish that the loss of the industrial use of his legs began as of January 1997. I find that he has failed to meet this burden.

Upon review of the medical evidence, I find that plaintiff's condition has deteriorated over the course of time; however, the medical evidence for the relevant time period, i.e., 1996 and 1997, does not reflect that plaintiff's condition was so severe as []t[o] render the use of his legs in industry practically impossible. At the time of his 1996 examination, Dr. Weingarden found that while plaintiff's surgeries necessitated significant restrictions, he nonetheless maintained the function of his lower extremities. Dr. Weingarden found that plaintiff had not lost strength in his legs and retained the ability to sit and stand. Likewise, when Dr. Mandel examined plaintiff in 1997, he too found that the plaintiff retained strength and function in his legs. He noted a range of activities that plaintiff regularly performed all of which required the use of his legs. And while he felt that restrictions were necessary, he opined that plaintiff could continue to work at his scissor-sharpening job. On the other hand, when Dr. Mandel examined plaintiff in 1999, he specifically noted that plaintiff's complaints were intensifying and his

[9] *Id*, 4 – 5.

> symptoms increasing. This conclusion is also reflected in the testimony of Dr. Belen when he was asked by defense counsel to compare his findings in 2001 with those made in prior examinations. While Dr. Belen opined that plaintiff's loss of industrial use began in 1997, this opinion is purely speculative and is rebutted by both the testimony of the physicians who actually examined plaintiff during the relevant time period as well as his own admissions on cross-examination.
>
> I also find it significant that plaintiff was able to work on a relatively regular basis through at least 1999. Although at the hearing plaintiff described his job duties as very limited, his description does not comport with the impressions of the examining physicians nor with the income he actually earned from the company. Therefore, I am not persuaded that plaintiff's role in the scissor sharpening business, at least in 1996 and 1997, was as limited as he testified to at the hearing. It is difficult to make a finding of loss of industrial use when the claimant is working and utilizing his legs to do so.[10]

Defendant Road Commission argues that plaintiff has failed to meet the *Sington* standard of disability. Because this matter was tried and decided before the Supreme Court issued *Sington*, it is understandable that the magistrate ceased her analysis when she found, pursuant to *Haske v Transport Leasing Inc, Indiana*, 455 Mich 628 (1997), that plaintiff was unable to return to work as a mechanic or welder. We remand the matter for completion of the record by means of a *Sington* analysis. MCL 418.861a(12).

Pursuant to *Sington*, the magistrate must determine what the plaintiff is qualified and trained to do, the plaintiff's post–injury efforts to locate other employment and the results of those efforts and whether there are any actual jobs available in any area of work for which the claimant is qualified and trained. We note that plaintiff had been employed by defendant since 1978, his prior jobs having been as a gas station attendant and as a cook at an A&W. It appears likely that his maximum wage was earned with defendant. We also observe that "qualifications and training," as now defined in *Sington v Chrysler Corp* (*On Remand*), 2003 ACO #92, is determined as of the time of injury. In *Riepen v Kelsey Hayes Co*, 2002 ACO #334, we wrote:

> Pursuant to *Sington*, plaintiff's qualifications and training must be determined as of his date of injury: "An inquiry must be made regarding whether the 'regular job' was suitable to plaintiff's qualifications and training at the time of the injury." Whether work is available within his qualifications and training paying maximum wages must be determined for all periods since his date of injury. Whether these jobs were altered in more than a *de minimis* fashion to accommodate plaintiff's limitations must be determined.

For its second argument, the defendant avers that, even should plaintiff be found disabled under *Sington,* the issue must be addressed whether plaintiff established a new wage earning capacity by means of operating his scissors sharpening business from 1992 through 2000. MCL 418.301(5)(d). We agree. That the presumption of a new wage earning capacity is rebuttable was recently set forth by

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[10] *Id*, 5 – 6.

the Court of Appeals in *Maier v General Telephone Co*, 247 Mich App 655 (2001). Contrary to plaintiff's argument, the burden of proof is on plaintiff; he must rebut the presumption that he has not established such a capacity, if it is determined he worked more than 250 weeks post injury. Also, plaintiff notes in his responsive brief that his post-injury income from the scissor sharpening business is his gross income, and must be evaluated as such. He also discusses the pivotal role his wife played, in that after she passed away, the business failed; she was "the backbone of the business."[11] Upon remand the magistrate will make this analysis as well, taking into account the relevant portions of the record.

Plaintiff's issue on cross appeal is that, contrary to the magistrate's determination, he proved total and permanent loss of industrial use of his legs due to his back pain. This determination is made in the time frame specified by the magistrate, in accordance with the statute, as permanency of loss no more than 30 days prior to the expiration of 500 weeks following date of injury, on these facts, January 1997. The magistrate's findings regarding the relevant medical examinations have been recited above. Specifically, the magistrate discussed the findings of Dr. Weingarden who examined plaintiff in 1996 and found him to have retained function of his legs. The magistrate accepted the findings of Dr. Mandel, who, upon a 1997 examination, also noted plaintiff's continued use of his legs. She explicitly rejected as "purely speculative," "rebutted" and weakened by "his own admissions on cross examination," Dr. Belen's conclusion, made upon his 2001 examination, that plaintiff's loss of industrial use was permanent as of 1997.

In challenging these findings, plaintiff's quotes from the various doctors' depositions, emphasizing the permanent nature of his objectively-manifested condition. In particular, he quotes from the rejected Dr. Belen who estimates permanency was established when the second surgery did not help and he quotes from Dr. Weingarden that portion of his testimony that the numbness in his plaintiff's legs and back was likely to persist. He also notes Dr. Weingarden's recommended restrictions for this plaintiff who "must be able to sit, stand or lie down at will."[12]

We are not persuaded by plaintiff's arguments that the litany of proofs he presents demonstrates that the findings made by the magistrate are not supported by competent, material and substantial evidence on the whole record. In fact, the proofs he cites are generally compatible with her findings. For example, the fact that plaintiff experiences numbness, which may or may not be permanent according to Dr. Weingarden, does not alone indicate that plaintiff has lost the industrial use of his legs. That the doctor recommends restrictions, including position changes at will, also does not necessarily indicate that plaintiff cannot use his legs in industry. The magistrate's basis for rejecting Dr. Belen's testimony is well supported in the record and is not really challenged by plaintiff; in fact, plaintiff does not directly address these findings.

Not only must plaintiff prove he lost the industrial use of his legs, he must prove this fact as of January 1997. The medical experts who examined and treated him then noted he was performing his work in the scissors sharpening business and would not restrict him at that time. Neither did those

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[11] Plaintiff's brief, 8.

[12] *Id*, 16.

physicians testify that plaintiff had lost the industrial use at that time. The magistrate's finding that plaintiff failed to carry this burden is supported in the record and is affirmed.

Therefore, this case is remanded for a *Sington* analysis and a section 301(5)(d) determination, should plaintiff be found disabled. Benefits shall continue to be paid pending the magistrate's decision on remand. We do not retain jurisdiction.

Commissioner Wyszynski and Chairperson Leslie concur.

Joy L. Witte

James Edward Wyszynski, Jr. Commissioner

Richard B. Leslie Chairperson

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

DAVID L. WEBB,
PLAINTIFF,

V

DOCKET #02-0230

MONROE COUNTY ROAD COMMISSION,
SELF INSURED, AND
SIF/PERMANENT & TOTAL DISABILITY PROVISION,
DEFENDANTS.

This matter is before the Commission on appeal by defendant Monroe County Road Commission, Self Insured, and on cross appeal by plaintiff David Webb from the decision of Magistrate Mary C. Brennan, mailed May 2, 2002, in which she granted plaintiff an open award for work-related injury to his legs, but denied his petition for total and permanent loss of the industrial use of his legs. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be affirmed in part and remanded. Therefore,

IT IS ORDERED that the magistrate's decision is remanded for a *Sington* analysis and a section 301(5)(d) determination, should plaintiff be found disabled. Benefits shall continue to be paid pending the magistrate's decision on remand. We do not retain jurisdiction.

Joy L. Witte

James Edward Wyszynski, Jr. Commissioners

Richard B. Leslie Chairperson